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IN THE

Supreme Court of the United States

October Term, 1957

No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

Brief for Industry Respondents in Reply to Brief for Amicus Curiae.

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Preliminary Statement.

Amicus Curiae, we think, has taken a stand in this cause not open to one in its position. It has reached for questions to discuss which go beyond the case as made by the parties to it. Even one who has such a direct and justiciable interest in the subject-matter of a litigation as to entitle him to intervene as a party must generally accept the case as he finds it at the time of intervention. That is much truer of one who, like *amicus,* has no justi-

ciable interest whatever but only a scholarly or civic concern not distinguishable from that of the public at large.

No doubt the constitutional questions discussed by *amicus* are inviting; but whatever may be their appeal there must still be a record plainly and inescapably calling for their determination before they can be reached. [*Edelman v. California*, 344 U. S. 357, 361-362 (1953).] This is not such a record. [Resp. Br. 23-40.[1] Point III, *infra* pp. 17-20.] Nevertheless, we propose to meet *amicus* head-on; but in doing so we are not to be taken as receding in any way from the position that the questions which it seeks to inject into this cause are not properly before this Court.

Summary of the Argument.

Since the Fifth Amendment is a limitation upon action of the national government and does not create any rights in one individual as against another, it is necessary, in this suit for damages for the asserted violation of rights secured by that Amendment, to show some Federal governmental action producing the injury complained of. That action is thought by *amicus* to be found in the participation of the Congressional Committee respondents in the alleged wrongful combination to exclude petitioners from employment. But the allegation of that participation is too amorphous and equivocal to raise any question

[1] The briefs in this cause are referred to herein by these abbreviations:
Brief for Petitioners, "Pet. Br."
Brief of Industry Respondents, "Resp. Br."
Brief for Amicus Curiae, "A. C. Br."

in that regard. That allegation states that their participation was in both official and non-official capacities, but it does not specify what, if anything, wrongful was done by the committee respondents in their official capacities. The allegation, in fact, is wholly consistent with, and the ordinary presumptions of the regularity of official action require, the inference that their only official action was to hold a regular meeting of the committee. That meeting was not alleged or shown to have been improper or unlawful in any way.

Furthermore, some part, at least, of the participation of the committee respondents was alleged to have been in their individual and non-official capacities. That, of course, supplies no basis for a conclusion of governmental or official action. And, to the extent that they may have acted officially, their acts were not the *wrongful* acts complained of. Even if they were, which does not appear, they were protected by the immunity conferred by Article I, Section 6 of the United States Constitution. So, the joinder of these respondents as defendants, upon the allegations directed against them, did not introduce into the cause any element of Federal action.

With respect to the contention that there has been a refusal by the State of California to recognize the supremacy of the Federal Constitution insofar as it secures the privilege against self-incrimination, it is obvious that the State's duty in the premises is no broader or different from that of the Federal government. The claimed abridgement of the privilege was not the result of any

action of the State. It was the result of private reaction to invocation of the privilege—an off-shoot of the social opprobrium and disgrace which not infrequently attaches thereto. The Federal government may constitutionally deny the privilege entirely so long as it provides an immunity as broad as the legal consequences which might result from compulsory self-incrimination; but it need not, as a condition of such denial, protect against the privately induced social or economic consequences which may follow upon such incrimination. The State's duty under the supremacy clause can be no greater. California has not attempted to deny the privilege to petitioners or to deter them from exercising it. The allegation, in fact, is that they freely and effectively exercised it. The most that can be said is that the State Court did not take affirmative action against the social or economic consequences claimed to have ensued, from private action, after that exercise. The State was no more compelled to take such affirmative action than is the Federal government when it denies all resort to the privilege. So far as it is claimed that private interference with the privilege is prohibited by the Civil Rights Act [18 U. S. C. §241], this case is not within the statute because it is not alleged that petitioners are citizens. It is only citizens who are protected by Section 241.

In any event, these questions are not properly before this Court. They were not raised or decided below. They did not need to be decided below. They are not within the scope of the one constitutional question presented by the petition for certiorari.

ARGUMENT.

I.

The Complaint Fails to Show That Any Federal Governmental Action Was Involved in the Allegedly Wrongful Conduct Complained of. Consequently, It Raises No Question Under the Fifth Amendment.

A considerable part of the argument advanced by *amicus* is based on the proposition that the alleged participation of the so-called committee respondents in the acts complained of by petitioners establishes such Federal governmental action as to amount to a violation of rights secured by the Fifth Amendment.[2] [A. C. Br., 8-13.] It is, therefore, of the first importance that we know precisely what it is that is alleged against these respondents; especially since *amicus* has slurred over that vital point.

It is first alleged with respect to the committee defendants (eleven in number) that nine of them, naming them, were members of the "Committee on Un-American Activities, United States House of Representatives" and that the other two were, respectively, Senior Investigator and an Investigator of the Committee. [R. 34.] Next it is

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[2]We may defer for the moment consideration of whether this or any other question discussed by *amicus* is really involved in this cause; was seasonably or appropriately raised or decided below; or is within the scope of the questions presented in the petition for certiorari. The determined effort of *amicus* to get into this case some semblance of governmental activity—even though that effort requires going beyond the case made by petitioners—bespeaks the realization that without some such activity there is nothing in the case but a private controversy over a question of state law. [See Resp. Br. 10-17.]

averred that "with respect to the matters *hereinafter alleged* the [committee] defendants . . . acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities." [R. 34-35. Italics ours.]

What was "hereinafter alleged," insofar as it charged any activity on the part of the Committee defendants, was only this:

1. All of the defendants—industry as well as committee defendants—"agreed with each other to refuse employment to and exclude from employment in the motion picture industry all employees and persons seeking employment in the motion picture industry," who engaged in certain types of conduct. [R. 35-36.]

2. As part of that agreement all of the defendants are circulating a list containing the names of such employees and other persons. [R. 36.]

3. On given dates in 1951, various of the petitioners appeared, under subpoena, as witnesses before the Committee, at which time they refused, on grounds of self-incrimination among others, to answer certain questions concerning their political affiliations, beliefs and associations. [R. 36.]

No attempt whatever is made in the complaint to specify or differentiate between what was done by any of the committee defendants in their official capacities and what they did in their individual or non-official capacities. For all that appears in this record, their official action may have consisted only of sitting as a committee and asking

the questions which the petitioners refused to answer; and their alleged joinder in the exclusionary agreement complained of, was, in the language of the complaint, "individually in non-official capacities."[3] [R. 35.]

Petitioners have sought to supplement their allegation by reference to some comments made or questions asked by various committee members at hearings of the Committee on Un-American Activities. Most of these relate to hearings in which petitioners were not involved and are comments or questions of Congressmen other than those named as defendants in this case. [Pet. Br. App. B, 5, 7-19, 47-57.] From these fragments, culled from the record of hearings carried on over a period of several years, petitioners and *amicus* seek to draw the conclusion that the Committee members named at bar exerted official power to bring about the exclusionary agreement here involved.[4] [Pet. Br. 7-9; A. C. Br. 12-13.]

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[3]We know from the complaint that these defendants did *some* of the alleged acts in their individual or non-official capacities. Having regard to the deference properly due a co-ordinate branch of the national government and to the presumptions of regularity of official action which generally prevail until the contrary is shown [cases cited, *infra*, p. 10] the allocation of activity suggested in the text above would seem to be the only fair inference to be drawn from the imprecise and ambiguous allegation of "official" action. That inference is buttressed by the fact that the "official action" of these respondents is alleged to have been "with relation to said House Committee." [R. 35.]

[4]The comments or questions thus attributed to members of the committee who are named as defendants do not support the conclusion. Their general tenor, for the most part, was merely an inquiry as to whether certain writers, previously convicted of wilfully failing to answer pertinent questions before the committee, were, to the knowledge of a witness, working under assumed names. [Pet. Br. App. B., 47 (Kearney), 52 (Jackson)]; or whether a witness had knowingly employed Communists. [*Id.* 55 (Moulder)] Congressman Wood, speaking only for himself, went somewhat farther. [Pet. Br. App. B., 51.]

We may lay on one side a number of questions which arise from that effort at supplementation.[5] For the purposes of meeting *amicus* on the ground it has chosen we will assume, without conceding, that the matters so referred to are properly a part of the record at bar. Notwithstanding that assumption, the argument of *amicus* cannot command acceptance here.

First: The argument is not in any way based upon a claim that the State of California has acted to abridge any rights secured by the Fifth Amendment.[6] Rather, the argument is that Federal officials have so acted; and that their alleged joinder with private individuals in that regard subjects all of the participants to personal liability in damages. An essential premise of the argument, then, is *official* action by Federal officials. Without that, their acts, whatever they may have been, are only those of private individuals, against which the Fifth Amendment provides no protection. [*Corrigan v. Buckley*, 271 U. S. 323, 330 (1926); *Courant v. International Photographers*, 9 Cir., 176 F. 2d 1000, 1003 (1949), *cert den.* 338 U. S. 943. See *Shelley v. Kraemer*, 334 U. S. 1, 8-9 (1948); *Talton v. Mayes*, 163 U. S. 376, 382 (1896)].

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[5]For example: Are the matters referred to properly within the bounds of judicial notice? [See Resp. Br. 19, n. 20]. May the present Committee members, defendants here, be held *personally* liable in damages for utterances and acts of their predecessors or colleagues in office, especially when the defendants are not shown to have concurred in or adopted those utterances or acts? Do these utterances show anything more than an improper motive which cannot have the effect of vitiating the Committee's investigations or making its acts unlawful? [See *Watkins v. United States*, 354 U. S. 178, 199-200 (1957)].

[6]We come in a moment to the contention that the supremacy clause compelled the State to recognize a cause of action for the asserted abridgement of petitioner's privilege against self-incrimination. [Point II, *infra*, pp. 14-16.]

The allegation which it is claimed shows official action on the part of Federal officials is too ambiguous and uncertain to raise any question under the Fifth Amendment. It is of a kind with the allegation held, in *Ellis v. Dixon*, 349 U. S. 458, 462 (1955), to be insufficient to raise any question of due process or equal protection under the Fourteenth Amendment.[7]

The allegation here does not even point with clarity to any illegal or improper *official* conduct on the part of the committee respondents. As already noted, the allegation is entirely consistent with the view that the participation of the committee respondents in the claimed unlawful agreement was as individuals, not as Congressmen; and that their only alleged activity in an official capacity was to hold a committee hearing not alleged or otherwise shown to have been invalid or unlawful. [*Supra*, pp. 5-7.] In fact, since there is nothing to the contrary alleged, the only fair interpretation of this equivocal allegation is one which would make it consistent with regularity of official action.[8] There is nothing in this record to negate

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[7]In *Ellis* the question sought to be raised was whether refusal of the use of a public school building for a forum "On Peace and War" by a private organization was so discriminatory as to amount to a denial or deprivation of rights under the Fourteenth Amendment. The allegation in that regard was that other organizations "have been allowed to use Yonkers school buildings in the past 'for the purpose of public assembly and discussion' . . ." This Court, after pointing out that there was nothing to show that these other organizations were comparable to the complaining organization or to show what the general practice had been in permitting non-scholastic use of school buildings, said that the allegation to which we have referred was "too amorphous to permit adjudication of the constitutional issues asserted. . . ." [349 U. S. at 460-461, 462. Compare the cases cited, Resp. Br. 37.]

[8]It cannot be doubted that the Committee could have conducted a lawful investigation into Communist infiltration of the motion picture industry, and that in the course of that investigation it could have pertinently inquired into the membership of various individuals

the presumption of regularity with which all official action is clothed. [See, *Ex parte Mitsuye Endo,* 323 U. S. 283, 300 (1944); *Anniston Mfg. Co. v. Davis,* 301 U. S. 337, 357 (1937); *Bank of the United States v. Dandridge,* 12 Wheat. 64, 69-70 (1827).]

Of course, if the participation of the committee respondents in the activities claimed to have been unlawful was an individual or non-official participation, their position in the litigation and their liability, if any, to the petitioners would be no different from that of the non-official or industry respondents.

Second: When the attempt is made to bring to the aid of this ambiguous allegation the conduct of hearings by the Committee, another serious obstacle in the way of acceptance of the argument of *amicus* is raised. What is shown in that regard is only that some members of the Committee made some comments and asked some questions which are interpreted by *amicus* and petitioners as showing a purpose or motive to bring about exclusion from employment. But the Constitution of the United States, Article I, Section 6, expressly provides in that regard that "for any Speech or Debate in either House [the Senators and Representatives] shall not be questioned in any other place." When it is remembered that the effort here is primarily, if not solely, to impose a personal liability upon

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connected with the industry in the Communist Party. It has been so held with respect to the very investigation of 1947 upon which petitioners and *amicus* rely. [*Lawson v. United States,* App. D. C., 176 F. 2d 49, 51-52 (1949), *cert. den.* 339 U. S. 934. See, also, *Dennis v. United States,* App. D. C. 171 F. 2d 986, 987, 988 (1948) *aff'd* 339 U. S. 162, and cases there cited.

the respondents for damages alleged to amount to over $57,000,000.00, the applicability of that provision is clear.

The history of this clause of the Constitution and its great importance "in the presuppositions of our political history" are fully explained in this Court's opinion in *Tenney v. Brandhove,* 341 U. S. 367, 372-373 (1951). [See, also, *Kilbourn v. Thompson,* 103 U. S. 168, 201-205 (1880), holding that the immunity extends not alone to "Speech or Debate" but "to things generally done in a session of the House by one of its members in relation to the business before it."] The policy evidenced by the clause prompted this Court to hold in the *Tenney* case that the Civil Rights Act [42 U. S. C. §§ 1983, 1985 (3), formerly 8 U. S. C. §§ 43, 47 (3)] did not impose liability upon the members of a State legislative committee who were alleged to have conspired with an outsider to intimidate and silence the plaintiff from exercising his constitutional rights of free speech and of petition for redress of grievances. The case at bar, involving those who are precisely the persons to whom the privilege of immunity applies, is an even stronger one for application of the rationale of *Tenney.*

It is significant too that in *Tenney* it was plainly noted that the "privilege would be of little value if [the members of Congress] could be subjected to the cost and inconvenience and distractions of a trial *upon a conclusion of the pleader . . .*" [341 U. S. at 377. Italics ours.] At bar there has been built up an argument which would circumvent Congressional immunity upon an allegation which

does not even rise to the doubtful dignity of a "conclusion of the pleader"; for it is one which does not tell us whether the asserted wrongful acts were or were not official.

To state a cause of action against the Committee respondents it would have to appear that what they did was not within their constitutional immunity. To make that appear it would have to be shown that what they did was not done as Federal officials but as private individuals. And once that was shown it would be clear that for purposes of this case no claim of Federal governmental action could be postulated on their acts. Their presence in this case as defendants, therefore, does not make this a case presenting any question of violation of rights under the Fifth Amendment—for that Amendment is a limitation on the action of the national government. [Cases cited, *supra,* p. 8.] And, for the reasons given at length in our brief to the merits, it is not a case of which cognizance may be taken under the Fourteenth. [Resp. Br. 40-52] It is only a case, as below everyone thought and treated it to be, of alleged interference with business relations by private individuals, with no governmental action—State or Federal—of such a character involved as to raise any question under the Constitution of the United States. [Resp. Br., 1, 3-8, 10-17]

II.

The Supremacy Clause Is Not Applicable to Compel Recognition of a Cause of Action for Alleged Private Interference With the Self-Incrimination Privilege. While Congress May It Is Not Compelled to Act and Has Not Acted to Protect the Privilege Against Private Interference. So, There Is No Law of the United States in This Regard Which the States Must Obey.

First: Perhaps the main emphasis of *amicus* is upon the proposition that there has been shown an abridgement of the self-incrimination privilege secured by the Fifth Amendment; and that the supremacy clause [*U. S. Constitution,* Art. VI, Cl. 2] compels the State of California to provide a civil remedy in damages against those responsible for that abridgement [A. C. Br. 8-15]. The argument is not made to depend on the participation of government, State or Federal, in the asserted abridgement. It rests entirely on the private or individual action of which petitioners complain.[9]

No doubt the Congress, probably even the States, could constitutionally prohibit or punish private interference with the self-inerimination privilege. [Cf., *Ullmann v. United States,* 350 U. S. 422, 435-436 (1956); *United States v. Wheeler,* 254 U. S. 281, 299-300 (1920).] That is not the question here. The question is whether the Federal government has done so and, if not, whether it is *compelled* to do so. If it has not done so and is not com-

[9]For reasons already given, pages 5-7, 9-10, *supra,* the Committee respondents' alleged involvement in this abridgment must be taken as having occurred in their non-official capacities.

pelled to do so, the supremacy clause does not require the States to do any more.

The decisions of this Court make it clear that the Federal government is not required, as a condition of denying even all resort to the privilege, to protect against the private or practical consequences which compulsory self-incrimination may bring in its train. It is enough if the evil against which the privilege was designed to guard, *i. e.*, exposure to possible prosecution as the result of one's own testimony, is warded off. [*Ullmann v. United States, supra,* 350 U. S. at 430-431, 437-439; *Brown v. Walker,* 161 U. S. 591, 605-606 (1896); *Smith v. United States,* 337 U. S. 137, 146-147 (1949).]

These decisions plainly show that the purpose of the privilege is not to protect one from the social disgrace or humiliation or the private economic consequences which may follow from public reaction to the compulsory disclosure which denial of the privilege brings about. Because that is not its purpose, and notwithstanding that such consequences may be produced, the Federal government—as this Court long ago held [*Brown v. Walker, supra,* 161 U. S. 591] and only recently reaffirmed [*Ullmann v. United States, supra,* 350 U. S. 422]—need not protect against them even when it takes the privilege away entirely. Nothing in the supremacy clause makes the State's duty in this regard any broader or different.

The deterrent to exercise of the privilege which is seen by *amicus* in the instant case is solely the product of individual action, of private reaction to a refusal to deny

Communist Party membership. It is a fact that in this country such a refusal carries with it public opprobrium of the same sort which follows upon exposure of one as a Communist.[10]

Ullmann teaches that such a non-legal consequence of compelled disclosure of Communist membership does not invade the constitutional privilege, even when the Federal government compels the disclosure and thus is the cause of the consequence. No different or greater inroad upon the privilege is made by a similar non-legal consequence following invocation of it, especially when, as here, government has no part in the process. In either case the privilege has accomplished its purpose of preventing prosecution as the result of such compelled testimony—in the one case by granting immunity from such prosecution; in the other by permitting the privilege to be raised to prevent compelled testimony. In each case social opprobrium or economic detriment may ensue; but in neither case is government required to protect the witness against that consequence.

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[10]Disclosure that a person is a Communist "practically excommunicates him from society . . . ." [Douglas, J., dissenting, *Ullmann v. United States, supra*, 350 U. S. at 453]. It is indeed true that a "heated public feeling against Communists" exists "among many persons—probably a large majority . . ." [L. Hand, J., in *Dennis v. United States*, 2 Cir., 183 F. 2d 201, 226 (1950) *aff'd* 341 U. S. 494.]

It is uniformly held that an accusation that one is a Communist or a Communist sympathizer is libelous *per se*. [*Spanel v. Pegler*, 7 Cir., 160 F. 2d 619, 622 (1947); *Grant v. Reader's Digest Ass'n*, 2 Cir., 151 F. 2d 733, 734-735 (1945), *cert. den.* 326 U. S. 797. The cases are collected in *Annotation*, 171 A. L. R. 709.] The premises upon which decisions of this kind rest is the Court's judicial knowledge that such a charge exposes one to public scorn, hatred and obloquy.

This view of the matter does not leave the privilege at the mercy of the action or inaction of the States or even of individuals. The Congress has ample power, if it chooses to exercise it, to put such safeguards around the privilege as it deems necessary or wise to protect those who use it from private interference or economic detriment. [See *Ullmann v. United States, supra,* 350 U. S. at 435-436; *United States v. Wheeler, supra,* 254 U. S. at 299-300.]

Second: It is argued by *amicus* that Congress has already acted to prevent private interference with the privilege, citing 18 U. S. C. §241; so that California, it is contended, was bound to follow suit. [A. C. Br. 15-17] Whatever may be said for that reasoning in a case coming within the ambit of Section 241, it is quite irrelevant in the case at bar. Section 241 interdicts only conspiracy "to injure, oppress, threaten, or intimidate any *citizen* in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ." (Italics ours.) It is nowhere alleged in this record that any one of the petitioners was or is a citizen of the United States. That omission is fatal to any claim of right under Section 241.[11] [*Baldwin v. Franks,* 120 U. S. 678, 690-692 (1887). *Cf., United States v. Williams,* 341 U.S. 70, 77, 80, 81 (1951).] This is not, therefore, a case to which the supremacy clause applies; for the "law of the United States," to which California, it is claimed, refused obedience, was not applicable to the case before the State Court.

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[11]The absence of any allegation of that elementary but essential prerequisite of a cause of action under Section 241 also demonstrates that petitioners did not have in mind, and were not making, any such claim of right. The argument of *amicus* is simply an effort on its part to inject an issue into this case not contemplated by the parties.

III.

The Questions Argued by Amicus Are Not Properly Here. They Are, in Any Event, Beyond the Scope of the Questions Presented by the Petition for Writ of Certiorari.

For reasons which have been stated at length in our brief to the merits, this Court is without jurisdiction; and, in any event, the questions argued should not be considered because they are beyond the proper scope of the questions presented by the petition for certiorari. [Resp. Br. 3-8, 23-40, 52-55] An additional word or two may be ventured in that regard with respect to the specific questions argued by *amicus*.

First: The question as stated by petitioners both in the petition for certiorari, page 3, and their brief, page 3, is whether the "*judgments* of the state court dismissing petitioners' complaint" [italics ours] deprived the petitioners of rights under the Fourteenth Amendment. Manifestly, they had so to present the question since they are aware as anyone of the fact that the Fourteenth Amendment proscribes State, not individual, action. *Amicus*, however, goes beyond not only the confines of the Fourteenth Amendment by resorting to the Fifth, but treats the question as being whether the individual action of the respondents, having regard to the alleged participation of the Committee respondents, violated rights secured by the Fifth Amendment or by 18 U. S. C., §241.

To support its attempt to inject this quite different question into the case, *amicus* says that petitioners "have at all times stressed the infringement of their privilege against self-incrimination . . ." [A. C. Br., 5] It ignores, however, the context in which that "stressing" occurred. It was not as the basis of any claimed right under either

the Fifth Amendment or 18 U. S. C., §241, but as an answer to respondents' argument that the alleged exclusionary combination was justified as a reasonable means of protecting their interest in preserving their business enterprises from public disfavor. That answer was, among others, that petitioners' interest in the self-incrimination privilege outweighed respondents' interest in their business freedom, so that justification was not made out.

That was the problem which the trial court *discussed* in its opinion. [R. 46-50. See, also, Resp. Br. 36, note 26.] But even the trial court did not *decide* the question, for it said that ". . . . it is not necessary to go that far. It is necessary, as stated at the outset, that plaintiffs plead facts sufficient to show that the concert of agreement was not justified under the circumstances." [R. 50]

The District Court of Appeal did not reach or decide the question of justification at all; and did not even discuss it. [Resp. Br. 15-17] It affirmed the judgment on another ground as, under the State practice, it was entitled to do. [Resp. Br. p. 6, n. 5.]

Thus we see that neither court below decided any question of the sort which *amicus* raises, even if it be assumed that the question as it is now presented was before those courts. Nor did it have to be decided. The ground upon which the judgment was ultimately made to depend was independent of that question and was adequate to sustain the judgment. [Resp. Br. 25-30]

Second: Amicus says that this Court may decide for itself whether the complaint states a cause of action for

violation of Federal right. [A. C. Br. 4] No doubt that is true. But this Court cannot decide for itself whether the complaint states a cause of action under State law. Upon that issue the determination of the State Court is conclusive. [Cases cited, Resp. Br., 26.] And if that determination is adequate to sustain the judgment and independent of the asserted claim of Federal right, that is an end of the matter so far as review here is concerned. That is the case at bar. [Resp. Br. 25-30.]

It is obviously one thing to hold that review of a State Court's denial of a Federal right is not forestalled by local procedure or practice. It is quite another to hold that there may be review here of a State Court's determination of a local question. Furthermore, even in the first instance referred to there must have been a *denial* of the Federal right; and when, as here, that denial is claimed—at least by petitioners—to have been accomplished by a *judgment* of the State Court, it must appear that the Court actually decided the question or arbitrarily and groundlessly evaded decision of it. Neither of these necessary elements is found in the instant case.

Third: The State Court's ground of decision, *amicus* argues, "was not a tenable basis under State law . . ." [A. C. Br., 20.] That, of course, is a matter beyond this Court's constitutional power of review. [Resp. Br., 37-40.] It may be noted, however, that the California decisions upon which *amicus* depends are not inconsistent with the decision here. In those cases a cause of action for interference with business or contract relations was

recognized in respect of an *existing* relation. The absence of that relation or of any reasonable prospect of it prompted the contrary result in our case. [Resp. Br., 15-17.]

Conclusion.

The writ of certiorari should be dismissed for want of jurisdiction; or, alternatively, the judgment should be affirmed.

Respectfully submitted,

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